Before the
Federal Communications Commission
Washington, D.C. 20554

In the matter of Federal-State Joint Board on Universal Service	))))))	CC Docket No. 96-45

Comments of the Maine Public Utilities, Montana Public Service Commission and Vermont Public Service Board Concerning the Joint Petition Of The Wyoming Public Service Commission For Supplemental Federal Non-Rural Universal Service Support

I. INTRODUCTION AND SUMMARY

The Maine Public Utilities Commission (Maine), the Montana Public Service Commission (Montana) and the Vermont Public Service Board (Vermont) are pleased to file comments in response to the Notice of the Wireline Competition Bureau, DA 05-412, released on February 14, 2005. The notice requested comment on the December 21, 2004, Joint Petition filed by the Wyoming Public Service Commission and the Wyoming Office of Consumer Advocate (collectively "Wyoming") for supplemental universal service funding for customers of Wyoming's only non-rural incumbent local exchange carrier, Qwest Corporation.

Maine, Montana and Vermont generally support the petition. Although Wyoming's support calculation has flaws, as indicated below, the facts indicate that Wyoming should receive $3.08 million in additional support. However, the recent *Qwest II* decision suggests that if the national cost benchmark were changed to an appropriate level, Wyoming should receive at least the $4.7 million it originally suggested. In granting additional support, however, the Commission should not base its determination on an *ad hoc* examination of Wyoming's rates. The most appropriate mechanism for providing support to Wyoming and other similarly affected states is to lower the present cost benchmark and to correct the infirmities in the hybrid cost proxy model.

II. Discussion

A. Entitlement to Additional Support

1. The Case For Additional Support

Wyoming points out that it has a low population density, equal to 5.1 persons per square mile, and a widely dispersed population.[1] These facts, taken together, are strong evidence that Wyoming indeed has high average costs and is worthy of additional federal universal service support. Although low density is not a sufficient indicator,[2] a state that has low density combined with high population dispersion is very likely to have high average costs.[3]

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[1] Petition at 5-6.

[2] As recognized by the Commission's Synthesis cost model, an empty space with neither roads, people nor telephone wires imposes no costs. It can, of course, increase transport distances between remote population clusters.

[3] A state with one city and an empty desert will have a low overall density, but it will not have costly telephone service. By contrast, another state with the same population and area but with an evenly dispersed population, would very likely have a high average cost.

As explained in the Commission's *Ninth Report Remand Order,*[4] the Commission construed the Act to define rates as "reasonably comparable" between urban and rural areas if rural rates are not more than two standard deviations above the mean urban rate, or 138 percent of the mean urban rate. Currently that threshold is $34.16.

Using that threshold, Wyoming provided an illustrative calculation of additional support. Wyoming suggests it needs an additional $4.7 million to bring Qwest-Wyoming's rates to a level that the Commission considers reasonably comparable to nationwide urban rates.[5] The calculation was based on the fact that 26 percent of Qwest-Wyoming's customers have a net rate of $42.28, which is $8.12 above the rate benchmark.

This is not a reasonable estimate of Wyoming's need. It ignores the fact that 74 percent of Qwest-Wyoming's customers have a rate of $33.17, an amount about a dollar below the $34.16 rate benchmark. Before Wyoming receives support for those areas above the national benchmark, it should be required to increase rates (or have an increase imputed) for the 74 percent of Wyoming customers whose rates are below the benchmark. Wyoming essentially seeks to lower rates for these high-rate Qwest customers without asking any more from the 74 percent of Qwest's customers who have below-benchmark rates or from customers of other Wyoming carriers who might contribute to a state universal service fund.

Another way of performing the additional support calculation is to take account of the customers paying less than the benchmark. This calculation suggests a need of approximately

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[4] *Federal-State Joint Board on Universal Service*, Order on Remand, Further Notice of Proposed Rulemaking, and Memorandum Opinion and Order, CC Docket 96-45, 18 FCC Rcd 22559 (2003) (*Ninth Report Remand Order*).

[5] Petition at 11.

$3.08 million. In this calculation all Qwest ratepayers are assumed to pay the benchmark rate. Therefore, below-benchmark rates for 74% of Qwest's customers offset, somewhat, above-benchmark rates for 26% of Qwest's customers. This is a reasonable adjustment because it requires Wyoming customers to make a reasonable effort before seeking additional federal support.

In a decision issued on February 23, 2005, the Tenth Circuit Court of Appeals granted in part a petition for review of the *Ninth Report Remand Order*.[6] The court held that the Commission's definition of reasonably comparable rates "rested on a faulty, and indeed largely unsupported, construction of the Act" and was "manifestly contrary to the statute."[7] The court held that the current rate benchmark fails the statutory test of reasonable comparability. The court noted that:

> . . . rural rates falling just below the comparability benchmark may exceed the lowest urban rates by over 100%. Even if such rural rates are compared against the national urban average, we fail to see how they could be deemed reasonably comparable . . . ."[8]

The court remanded to the Commission, in part to define the term "reasonably comparable" in a manner "that comports with its concurrent duties to preserve and advance universal service."[9] This decision does not provide any reason to deny relief to Wyoming. On the contrary, it offsets the fact the Wyoming overlooked below-threshold rates for 74 percent of its customers. On balance, Wyoming should be granted not less than the relief it seeks,

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[6] *Qwest v. FCC,* ___ F.3d ___, 2005 WL 419769 (10th Cir., Feb. 23, 2005) (hereafter "*Qwest II*").

[7] *Id.,* slip op. at 27.

[8] *Id.,* slip op. at 30.

[9] *Id.*

approximately $4.7 million of additional support, although for different reasons than Wyoming originally suggested.

Qwest II also provides ample reason for prompt action. It has now been nine years since Congress stated that customers in rural areas are entitled to have rates that are reasonably comparable to urban areas. More than two years passed between the court's decision in *Qwest I* and the Commission's *Ninth Report Remand Order*, which was issued in late 2003. The fourth anniversary of *Qwest I* now approaches, and still the Commission has not demonstrably provided sufficient support to the customers of nonrural companies. While the issues presented on remand to the Commission are undoubtedly complex, this petition offers an immediate opportunity to provide relief to the ratepayers of high cost nonrural carriers, even while it considers additional responses to *Qwest II.*

2. Explicit Subsidies

Wyoming has indicated that it has transformed Qwest's rates "from the traditional, implicit subsidy-laden rates to total service long-run incremental cost-based rates supported only, when necessary, by explicit subsidies."[10]

Wyoming's intrastate rate design history should have no influence on whether Wyoming receives additional support. *Qwest II* explicitly found that unbundling and making support explicit is not a prerequisite for receiving sufficient support. The Act "does not create a backdoor to federal manipulation of state support mechanisms."[11]

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[10] Petition at 7.

[11] *Qwest II*, above, slip op. at 20.

B. Appropriate Mechanism for Additional Support

While Wyoming is entitled to additional support, Wyoming has not identified the most appropriate form for that relief. In accordance with the mechanism outlined by the Commission in the *Ninth Report Remand Order,* Wyoming seeks a specific grant of additional support for Qwest-Wyoming. In essence, Wyoming seeks a variance from a system that has provided insufficient support to Wyoming ratepayers, leaving them with excess uncovered costs.

The relief requested by Wyoming presents practical and legal problems. First, approval of Wyoming's petition could lead to a flurry of similar petitions from states, such as Vermont, that also have high rates and that feel they are receiving inadequate support under the existing mechanism.[12] *Qwest II* will only tend to increase the number of states interested in exploring this form of relief because that court rejected the Commission's existing rate and cost benchmarks.

Second, approval of Wyoming's petition will enmesh the Commission in granting support based on the level of local exchange rates. This would likely require resolution of complex factual questions about how best to measure local rates. It seems likely, for example, that the Commission will have to estimate the burden involved when states authorize local measured service charges.[13] Other potentially difficult issues involve the size of local calling areas and how best to evaluate local option plans and toll-local packages.

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[12] Many of the other nine states already receiving model-based support, as well as states that are barely ineligible for support, may believe themselves in this category.

[13] As noted in Vermont's comments on the *Notice of Proposed Rulemaking* accompanying the *Ninth Order Remand Order*, the Commission's current rate measurement methodology does not give sufficient weight to local

It was at least in part for this reason that the *Ninth Report Remand Order* disparaged awarding support based on local exchange rates. That Order said:

> Because the states retain jurisdiction over intrastate rates, the Joint Board and the Commission always have looked at cost differences, not rate differences, in determining high-cost support. States may base rates on a variety of factors, so that comparing only rates, which may or may not include implicit support, would not be a fair and equitable way to apportion federal support. Because the underlying purpose of rates is to recover the cost of providing service, comparing costs provides a more accurate and consistent measure of what rate differences would be in any given state, given identical state rate policies.[14]

In addition, a state-by-state decision process, such as that proposed here, is unlikely to comply with the statutory requirements that federal support be "specific" and "predictable."[15] It will be difficult for the Commission, using this method, to evolve a reasonably stable body of law about how amounts of additional support should be calculated. In a state-by-state decision system, the results for individual states will inevitably be determined based upon particular facts and Commission judgment. No such system is likely to be even remotely "predictable."

Finally, state-by-state determinations would also fail to meet the challenge posed in *Qwest II.* Sufficiency of support was the central issue in *Qwest II*. The court found that the Commission had not properly justified its existing cost benchmark, a critical parameter of its support mechanism. The court said the Commission had:

> based the two standard deviations cost benchmark on a finding that rates were reasonably comparable, without empirically demonstrating a relationship between the costs and rates surveyed in this context.

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measured service pricing as a component in the overall cost of purchasing the bundle of services supported by universal service programs.

[14] *Ninth Report Remand Order,* ¶ 23.

[15] *See* 47 U.S.C. § 254(b)(5), (d).

The court remanded to the Commission to carry out its statutory directive to preserve and advance universal service. This is the second time that the Commission has failed to persuade the Court of Appeals that its cost-based mechanism is providing sufficient support to large nonrural carriers. It will be difficult for the Commission to consider and decide state-by-state decisions while this broader issue is pending.

A broader remedy should be considered. Under the existing support system for nonrural carriers, Maine, Montana, Wyoming, Vermont and six other states receive federal support for their nonrural carriers based on the same cost model and the same distribution methodology. Wyoming's petition requires a finding that Wyoming's support is insufficient. But that fact, once found, is powerful. It is also competent to show, less directly perhaps, that the support provided by that same system to other states, including Maine, Montana and Vermont is also insufficient. There is certainly no reason to believe that a uniform nationwide system, having demonstrably failed in Wyoming, is working well elsewhere.[16]

Lowering the benchmark would solve this general problem as well as Wyoming's specific problem. Currently Wyoming receives $11.32 million per year of model-based support.[17] Wyoming suggests that it be granted an additional $4.7 million.

The current cost benchmark in the model-based support mechanism is $28.13. If the Commission reduced that benchmark to $26.00, that would be a benchmark reduction of $2.13.

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[16] Like Wyoming, Vermont's October, 2004 certification to the Commission stated that rates in Vermont are not reasonably comparable to urban areas nationwide.

[17] USAC report HC16 for 2004Q4.

That in turn would produce $1.62 per line per month[18] of additional support for every customer served by a company currently receiving support.[19] In Wyoming, that produces an additional $4.75 million, almost exactly what Wyoming suggests.

Nationwide, reducing the cost benchmark to $26.00 would increase total support by approximately $207 million per year. Some would no doubt consider this a large increase, but it should be seen in perspective. An increment of $207 million is indeed a large percentage increase in this program, but only because the program historically has been insufficient. Seen in the larger context of all high-cost support, the increase is small; it would enlarge the current high cost support by less than six percent.[20] This is only a fraction of the amounts added when the Commission created the Interstate Common Line Support and Interstate Access Support mechanisms.

If the Commission decreases the benchmark, that should not be the only change. The Commission has allowed its forward-looking model to languish the last five years. Although many observers have questioned the reliability of the model, and particularly its tendency to produce very high average cost estimates in particular states, the Commission has not taken any steps to enhance the model. If the Commission is willing to undertake such work, it seems a distinct possibility that more support can be provided to high-rate states like Wyoming, without also adding massive infusions of new support to other states that seem to have less need.

[18] $1.62 is equal to $2.13 times 76 percent, another parameter in the Commission's distribution mechanism.

[19] It would also produce a smaller amount of incremental support per month for customers in Arkansas and Idaho that today are ineligible for any support.

[20] The current high cost total per year is $3.7 billion. USAC Table HC02 for 2004Q4.

The Commission has failed for nine years to demonstrably provide sufficient support to customers of nonrural carriers in high-cost states. We encourage the Commission to make a good faith gesture in this proceeding not only to Wyoming but also to other states that, like Vermont, Maine and Montana,[21] were parties or interveners to *Qwest II* and that also have extensive high-cost areas served by "nonrural" companies.

III. CONCLUSION

For the reasons given above, Maine, Montana and Vermont support providing Wyoming with additional support. However, that support should not be provided on an *ad hoc* basis as Wyoming requests. Similarly situated states such as Montana, Vermont, Maine and West Virginia should also receive additional support. The most appropriate mechanism for providing support to Wyoming and other states that are similarly affected by insufficient cost-based support is to lower the present cost benchmark and enhance the hybrid cost proxy model so that its results are more generally accepted.

Respectfully submitted on March 7, 2004.

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